86-166

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK AUGUST SYLVIA

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES
FOURTH CIRCUIT COURT OF APPEALS

SIDNEY H. KELSEY, JR., P.C.
3408 BOYD ROAD
VIRGINIA BEACH, VIRGINIA 23452
(804) 340-7858

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I

Whether or not the petitioner was denied due process of law by the Court's denial of a continuance, by the Court's failure to require the government to identify and distinquish the drugs in a multi-count indictment, or otherwise be denied effective assistance of counsel in his defense.

II

Whether or not the government proved the exclusive possession of drugs allegedly retrieved from a maroon jacket on the premises of the co-defendant (III of indictment) to the exclusion of other drugs found.

III

Whether or not there was evidence sufficient to prove conspiracy (Count I of indictment).

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TO THE HONORABLE WARREN E. BURGER,
CHIEF JUSTICE, AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF
THE UNITED STATES

Frank August Sylvia, the Petitioner herein, prays that a Writ of Certiorari issue to review the decision and judgment of the United States court of appeals for the Fourth Circuit entered in the above entitled case on June 2, 1986.

OPINIONS BELOW

The unpublished opinion of the Fourth Circuit Court of Appeals decided June 2, 1986, is reproduced in Appendix at page

JURISDICTION

The Fourth Circuit's order affirming Petitioner's convictions in the district court was filed on June 2, 1986, and jurisdiction of the Supreme Court is invoked under §28 U.S.C. 1254(1).

No other Petitioner is involved in this Petition.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1254(1), Title 28 U.S.C. reads as follows:

"§1254 Courts of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Section 2, Title 18 U.S.C. reads as follows:

"(a) Whoever commits an offense

against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal."

Section 841, Title 21 U.S.C. reads as follows:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowlingly or intentionally--

(1) to manufacture, distribute, or possess with intent to manufacture, distribute, or dispense, a controlled substance;. . ."

Section 846, Title 21 U.S.C. reads as follows:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases, or in the militia, when in actual

service in time ofwar or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation."

The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trail, by an impartial jury of the state and district where the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and of the state wherein they reside. No state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the July, 1985 term of the Grand Jury sitting in the United States District Court for the Eastern District of Virginia, Norfolk Division, a three-count indictment was returned against Frank August Sylvia, Edward Carl Barbato and Lynn Akins Johnson. In Count I, the indictment charged all three defendants with conspiracy to possess with intent to distribute Methamphetamine, a Schedule II controlled substance in violation of Title 21 USC Section 841(a)(1) and 846. Count II of the indictment charged Lynn Akins Johnson with possession with intent to distribute Methamphetamine on July 11, 1985 in

violation of the same statute. Count III of the indictment charged Barbato and Sylvia, aided and abetted by Lynn Akins Johnson with possession with intent to distribute Methamphetamine in violation of the same statutory provision. Each defendant pleaded not guilty to the charges and the Court set a joint trial for September 17, 1985. The defendant, Sylvia, by counsel, timely filed multiple pre-trial Motions among which was a Motion for Continuance, Motion for Disclosure of Rule 404 Evidence, a Motion for Bill of Particulars and a Motion to Suppress Evidence with the government responding thereto respectively. On or about September 11, 1985, the defendant Barbato entered into

a plea agreement, agreeing to a plea of guilty and on or about September 17, 1985, the defendant Lynn Johnson entered into a plea agreement and agreed to plead guilty and both Barbato and Johnson agreed to testify on behalf of the government at Sylvia's trial.

On September 17, 1985, the morning of trial, the defendant renewed its pre-trial Motions, specified above and the Court denied defendant's Motion for Continuance and the government's response to the Bill of Particulars was not required except for a brief explanation from the U.S. Attorney which ultimately became the subject of much colloquy throughout the trial and in particular a hearing and ruling on

defendant's Motion to Suppress and various incidences during trial with regard to the applicability of a specific indentifiable Methamphetamine exhibit, which was requested in defendant's Motion for Bill of Particulars which ultimately affected instructions to the jury and Rule 404 evidence.

This case was heard in a jury trial beginning on September 17, 1985, lasting approximately three and a half days. When the government rested its case, the Court overruled defendant's Motion for directing a verdict of acquittal in favor of the defendant and the defendant rested without putting on evidence. The jury returned a verdict on September 20, 1985 of guilty to Counts I and III of

the indictment, was polled and discharged. The defendant orally moved the Court for a motion for judgment of acquittal notwithstanding the jury's verdict or in the alternative a motion for a new trial on the grounds of insufficient evidence pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure and thereafter filed a Brief in Support Thereof. The Trial Court denied these Motions. On October 31, 1985, the defendant was sentenced to confinement for a period of five years on each of the Counts, to run consecutively with three years special parole and assessments. On November 7, 1985, the defendant, by counsel, filed a timely Notice of Appeal from his

convictions to the United States Court of Appeals for the Fourth Circuit.

The case was appealed to the Fourth Circuit which found and concluded that the issues set fourth in the Questions Presented in the Instant Petition contained no non-frivolous grounds for appeal and accordingly affirmed the judgment in the U.S. District Court for the Eastern District of Virginia where the case was tried.

Petitioner hereby seeks certiorari through this Petition.

REASONS FOR GRANTING WRIT

I

Certiorari Should Be Granted To Resolve Conflicts Among The Lower Courts

The petitioner filed a Bill of Particulars in order to be informed of specific identifiable drugs in each Count of the three count indictment in order tc prepare his defense and be able to plead in bar to any other prosecution for the same offenses, United States v. Anderson, 481 F.2d 685 (Fourth Cir. 1973), aff'd, 417 U.S. 211 (1974) and the United States v. Dulin, 410 F.2d 363 (Fourth Cir. 1969) and therefore was not on a fishing expedition for the government to disclose its theory or witnesses, United States v. Kahaner, 203 F. Supp. 78, 83-85 (S.D.N.Y., 1969), aff'd, 317 F.2d 469 (2nd Cir.), cert. denied, 375 U.S. 838 (1963).

This Court has ruled that it is a Sixth Amendment right to be informed of the nature and cause of accusation which is applicable to the States through the Due Process clause of the Fourteenth Amendment, USCA Const. Amend. 6, 14, Spinkellink v. Wainwright, 578 F.2d 582, cert. denied, 99 S. Ct. 1548, 44 US 976, 59 L. Ed.2d 796, rehearing denied, 99 S. Ct. 2064, 44 US 937, 60 L. Ed.2d 667 (CA Fl., 1978). And under the Due Process clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. USCA Const. Amend. 14, California v. Trombetta, 104 S. Ct. 258 (US Cal., 1984). The record below established a timely motion for Bill of Particulars and a request at trial, that the government articulate which identifiable drugs were applicable to each count and to distinguish therefrom in order to properly prepare for trial, all of which was denied. This created confusion at trial

with the jury having the benefit of any or all separate drugs and conviction by by trial by ambush irrespective of petitioner's Rule 404 Motions to Prevent Unfair Prejudice in the combination of various offenses in the absence of allegations of a continuing criminal enterprise.

This Court established that a standard of due process is not whether the defendant in Court's opinion was in fact guilty, but whether defendant has received "fair" treatment. USCA Const. Amend. 5, 14. Phillips v. Smith, 632 F.2d 1019, cert. granted, 101 S. Ct. 1345, 450 US 909, 67 L. Ed.2d 332, reversed, 102 S. Ct. 940, 455 US 209, 71 L. Ed.2d 78, on remand, 552 F. Supp. 653, aff'd, 717 F.2d 44, cert. denied 104 S. Ct. 1287.

Court appointed counsel for the petitioner below in the Trial Court, moved for continuance of trial due to

time restraints in a timely fashion in view of other trials and last minute pleas at the time of the co-defendants. Whether denial of continuance is arbitrary enough to violate the Due Process clause depends upon circumstances, particularly in reasons presented to the Trial Judge at the time the request is denied, U. S. v. Little, 567 F.2d 346, cert. denied 98 S. Ct. 1608, 435 US 969, 56 L. Ed.2d 60, and a Trial Court's refusal to grant a continuance may very well deny a defendant effective assistance of counsel rising to arbitrariness as to violate the Due Process clause, Grigsby v. Mabry, 637 F.2d 525, on remand 569 F. Supp. 1273. The continuance requested was still within the mandatory trial cut-off date of the Speedy Trial Act, 18 USC Section 3161(h)(8)(B)(II), and should therefore give way to the ends of justice in allowing defense counsel the opportunity to

effectively prepare defendant's case in view of conflicts and eleveenth hour changes in the character of the trial, by the co-defendants' plea of guilty.

Therefore the petitioner submits that the above constitutes violation of his constitutional rights of Amendments Five, Six and Fourteenth Amendments of the U. S. Constitution by being denied due process of law in the prosecution of its case.

II

A defendant's mere presence in an area where narcotics are discovered is insufficient evidence to support a conviction for possession, U.S. v. Rojas, 537 F.2d 216, cert. denied, 97 S. Ct. 785, 429 US 1061, 50 L. Ed.2d 777 (CA Fl, 1976). See also U.S. v. Samad, 754 F.2d 1091 (CA4 Va., 1984). It is however essential that there be some nexus between the accused and the contraband and

that mere physical proximity to an unlawful drug is not in of itself sufficient to establish either actual or constuctive possession of prohibited substance, U.S. v. Rackley, (1984, CA 11 Fl.) 724 F.2d 1463. Moreover, the government must present evidence that defendant knowingly possessed controlled substance and exercised knowingly dominion and control either actual or constructive over such drugs, U.S. v. Collazo (1984, CA4 Md.) 732 F.2d 1200. At least constructive possession must exist in order to sustain a conviction, U.S. v. Laughman, 618 F.2d 1067 (4th Cir. 1980). Mere presence on the premises where drugs are found is insufficient to establish possession under the Statute, United States v. Staten, 581 F.2d 878 (D.C. Cir., 1978). See also Bentley v. Cox, 508 F. Supp. 870. Neither actual or constuctive possession was shown in this case, and the jury

because of the lack of identifiable drugs, lumped three separate sources of drugs together and convicted this petitioner of the drugs found in the maroon jacket, found on the premises but not in the petitioner's possession. The jury verdict was tainted because evidence of a drug transaction was also introduced over petitioner's objection on a prior transaction as well as a concurrent transaction of drugs found on Barbato who entered with the petitioner but was not identified in either the conspiracy or the substantive count. The above convictions, therefore were based upon the conduct of co-defendants, not petitioners to this petition who avoided trial by prior guilty pleas.

III

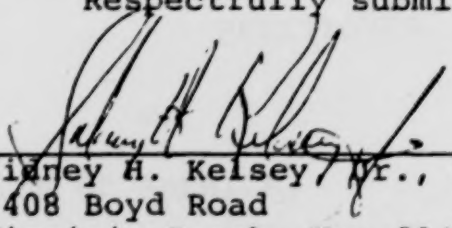
In Count I on the indictment below, a conspiracy was alleged between the petitioner Sylvia, co-defendant Johnson

and co-defendant Barbato, yet the trial evidence indicated otherwise. The sole source came from a witness of questionable credibility, co-defendant Johnson. Co-defendant Barbato denied such a conspiracy. Although the bare testimony of one co-conspirator may be enough, in this case it was insufficient to support a jury verdict especially in light of the source of all drugs involved which were not within the personal knowledge of any other witness, Glasser v. United States, 315 US 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942) and United States v. Samad, 754 F.2d 1091 (4th Cir., 1984).

CONCLUSION

For the foregoing reasons, petitioner asks that this Petition for Writ of Certiorari be granted.

July 30, 1986 Respectfully submitted,



Sidney H. Kelsey, Jr., P.C.
3408 Boyd Road
Virginia Beach, Va. 23452
(804) 340-7858

COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. _____

FRANK AUGUST SYLVIA,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PROOF OF SERVICE

STATE OF VIRGINIA

CITY OF VIRGINIA BEACH

SIDNEY H. KELSEY, JR., P.C., after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court be served the within PETITION FOR WRIT OF CERTIORARI to the Court of Appeals for Fourth Circuit on counsel for respondent by enclosing a copy thereof in an en-

velope, First Class postage pre-paid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at Virginia Beach, Virginia, on July 31, 1986.

Sidney H. Kelsey, Jr., P.C.,
Affiant

Subscribed and Sworn to Before Me
this 31st day of July, 1986.

Notary Public in and for
Said State of Virginia, at large.

My commission expires: [illegible]

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5564

United States of America,

Appellee, .

versus

Frank August Sylvia,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. Cr. No. 85-111-N

Submitted April 30, 1986

Decided June 2, 1986

Before MURNAGHAN, ERVIN and CHAPMAN, Circuit Judges.

Sidney H. Kelsey, Jr., P.C., on brief for Appellant; Susan L. Watt, Assistant United States Attorney, for Appellee.

PER CURIAM:

Frank August Sylvia appeals his conviction for drug offenses in violation of 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. §2. On appeal, Sylvia's court-appointed attorney filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), stating that in his opinion no meritorious issues exist on appeal. A copy of the Anders brief and an invitation to supply supplemental materials were provided to Sylvia, who has responded.

After an independent review of the record and other pertinent papers, we conclude that there are no nonfrivolous grounds for appeal and accordingly

affirm the judgment below.*

In the case of an unsuccessful appellant represented by appointed counsel, the responsibilities of the attorney are set forth in the plan adopted by this Court in implementation of the Criminal Justice Act of 1964. See 18 U.S.C. §3006A. These responsibilities include informing his client in writing of his right to petition the Supreme Court for a writ of certiorari. If so requested by his client, counsel should

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* Sylvia attempts to raise ineffectiveness of his counsel on appeal. This claim must be raised in a proceeding pursuant to 28 U.S.C. §2255. See United States v. Lurz, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982) Sylvia's motion for new courtappointed counsel on appeal is denied.

prepare a timely petition for the writ and take the steps that are necessary to protect the rights of his client. Therefore, counsel's request to withdraw from further representation is denied.

Because the record and other materials before us disclose no reversible error, we dispense with oral argument and affirm the conviction.

AFFIRMED